

October 7, 2008

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: Associated Press

Date of Filing: September 11, 2008

Case Number: TFA-0273

On September 11, 2008, the Associated Press (AP) filed an Appeal from a determination issued to it by the Office of the Executive Secretariat and the FOIA/Privacy Act Group of the Department of Energy (DOE/HQ) on September 4, 2008, in response to a request for documents that AP submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE expedite the processing of the AP's FOIA request.

I. Background

The FOIA generally requires that documents held by federal agencies be released to the public on request. In the absence of unusual circumstances, agencies are required to issue a response to a FOIA request within 20 working days of receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). The FOIA also provides for expedited processing of requests in certain cases. 5 U.S.C. § 552(a)(6)(E).

On September 2, 2008, the AP filed a request for correspondence between each of the vice presidential candidates, Senator Joe Biden and Governor Sarah Palin, and the U. S. Department of Energy from January 2007 to the present. Letters from AP to DOE/HQ (September 2, 2008) (Request). The AP also requested expedited processing because "this information involves a vice presidential candidate up for election in November and is therefore of extremely timely value and great public interest...." *Id.*

On September 4, 2008, DOE/HQ denied the AP's request, arguing that the request did not establish any urgency to inform the public that would warrant expedited treatment. Letter from DOE/HQ to AP (September 4, 2008) (Determination) at 1. Further, DOE/HQ concluded that the AP did not identify any particular urgency that requires the provision of the requested information in an expedited manner.

On September 11, 2008, the AP submitted this appeal of HQ's denial of expedited processing. The AP asks that the Office of Hearings and Appeals (OHA) order DOE/HQ to expedite the processing of its FOIA request. Letter from AP to Director, OHA (September 11, 2008).

II. Analysis

Agencies generally process FOIA requests on a “first in, first out” basis, according to the order in which they are received. Granting one requester expedited processing gives that person a preference over previous requesters, by moving his or her request “up the line” and delaying the processing of earlier requests. Therefore, the FOIA provides that expedited processing is to be offered only when the requester demonstrates a “compelling need,” or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i). “Compelling need,” as defined in the FOIA, arises in either of two situations. The first is when failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The second situation occurs when the requester, who is primarily engaged in disseminating information, has an “urgency to inform” the public about an activity of the federal government. 5 U.S.C. § 552 (a) (6) (E) (v). Our analysis in this case examines the second situation—the “urgency to inform.”

In order to determine whether a requester has demonstrated an “urgency to inform,” and hence a “compelling need,” courts must consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *Al-Fayed v. C.I.A.*, 254 F.3d.300, 310 (D.C. Cir. 2001).

Courts have found sufficient exigency to grant expedited processing in situations of an “ongoing public controversy associated with a specific time frame.” *Long v. Department of Homeland Security*, 436 F. Supp. 2d 38 (D.D.C. 2006). Requesters have demonstrated urgency in several ways. *See, e.g., Washington Post v. Department of Homeland Security*, 459 F. Supp. 2d 61, 65 (D.D.C. 2006) (granting expedited processing based on public need for requested material concerning visitors to vice presidential offices and degree to which lobbyists influenced policy discussions during an ongoing investigation prior to upcoming election); *Gerstein v. CIA*, No. C-06-4643, 2006 WL 3462658 (N.D. Cal. November 29, 2006) (granting expedited processing because of significant interest in quickly disseminating news regarding a subject currently under debate by Congress); *American Civil Liberties Union v. Department of Defense*, No. C-06-01698 WHA, 2006 WL 1469418, at *6 (N.D. Cal. May 25, 2006) at *6 (holding that expedited processing was warranted for information related to a “breaking news story,” *i.e.* a story that would lose value if it were delayed).

Courts have denied requests for expedited processing if the requester fails to demonstrate urgency. *See, e.g., Long*, 436 F. Supp. 2d at 43-44 (denying request due to generalized need for information and requester’s failure to identify an imminent action); *Electronic Privacy Info. Ctr. v. Department of Justice*, 322 F. Supp. 2d 1 (D.D.C. 2003) (concluding that plaintiff failed to demonstrate urgency because its proffer of 31 newspaper articles concerning the general subject of FOIA request did not make a story a matter of “current exigency”); *Al-Fayed v. C.I.A.*, 254 F.3d. at 310 (finding that there is no evidence of a substantial public interest in plaintiff’s allegations and that plaintiff did not demonstrate any significant adverse consequence if expedited processing was denied). *See also Eugenie Reich*, 29 DOE ¶ 80,289, Case No. TFA-0187 (March 5, 2007) (denying request for expedited processing because journalist did not establish urgency and did not make clear that the

requested information would not be useful to her if processed within the timeframe of a normal FOIA request).

The AP argues that the information requested relates to a currently unfolding story regarding the vice presidential candidates, specifically “on whose behalf and in what issues they may have intervened with the Department of Energy.” Appeal at 1. The AP also contends that any delay in release of the information will harm the public interest in knowing before the election the extent of the candidates’ involvement with the agency and if any intervention has affected any DOE action.¹

In its determination, DOE states that the AP “ha[s] not demonstrated the urgency that exists that would warrant expedited treatment of the request.” Determination at 1. DOE further advised the AP that DOE “cannot conduct a search on Governor Palin’s administration without the names of individuals in her administration.” Determination at 1. DOE asked the requester to provide the names of individuals for whom the search should be conducted. *Id.* We contacted DOE/HQ, and they explained that their decision to deny expedited processing was based on the lack of specificity in the AP request. Memorandum of Telephone Conversation between Chris Morris, FOIA /Privacy Act Officer, DOE/HQ, and Valerie Vance Adeyeye, Staff Attorney, OHA (September 17, 2008).

After reviewing the record of this case, we find that the AP has not established a compelling need for expedited processing of its request. First, the AP has not demonstrated that the correspondence of the vice presidential candidates, if any exists, is a matter of current exigency to the American public. It is true that the upcoming elections are important and that voters have a right to be informed. However, “[t]he public’s right to know, although a significant and important value, would not by itself be sufficient to satisfy [the “urgency to inform”] standard.” *Al-Fayed*, 254 F.3d at 310. Substantial interest on the part of the American public does not amount to exigency. *Electronic Privacy Information Center*, 322 F. Supp. 2d at 5. Second, the AP has not made clear that the requested information will not be useful if processed within the timeframe of a normal FOIA request (i.e. 20 working days). The fact that the election will take place in approximately 30 days does not demonstrate the requisite urgency.² Finally, the requested correspondence between the vice presidential candidates and DOE, if it exists, is not a “breaking news story” in this context. In case law related to expedited processing, a “breaking news story” is one that conveys information the public wants quickly, and that would lose value if it were delayed. *American Civil Liberties Union*, 2006 WL 1469418 at *6. The AP has not presented any “significant adverse consequence” that would result to a recognized interest if expedited processing of this request were denied. *See Al Fayed*, 254 F.3d at 311; *American Civil Liberties Union*, 2006 WL 1469418 at *8. I conclude that the AP argument that the candidates may have intervened in DOE activities is speculative and is not a “breaking news story” requiring expedited processing. Those instances where courts have granted an appellant’s request for expedited processing have involved high profile stories such as investigations into the alleged influence of lobbyists on the vice president, and investigations into a controversial Department of Defense database that collected information on political protesters. *See*

¹ The AP also argues that its request involves federal government activities. We agree with this argument.

² Under regular processing, the information would be released to the requester, if permitted by law, in sufficient time prior to the election for dissemination to the public.

Washington Post, 459 F. Supp. 2d at 61 (granting expedited processing of newspaper's request to Secret Service for logs of visitors to Vice President Cheney and members of his staff); *American Civil Liberties Union*, 2006 WL 1469418 at *1 (granting expedited processing of request for documents collected under controversial DOD program designed to gather information on terrorism and threats to military bases).

For the reasons stated above, we find that the AP has not established any urgency for the release of the requested material. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by The Associated Press on September 11, 2008, OHA Case Number TFA-0273, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli Marmolejos
Director
Office of Hearings and Appeals

Date: October 7, 2008